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Supreme Court of the United States

OCTOBER TERM, 1955

NO. 253

PATRICK A. McKENNA,

PETITIONER,

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, AND JOHN C. DEARMAS, JR.,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1958

No.

PATRICK A. McKENNA,
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v.

FRED A. SEATON, SECRETARY OF THE INTERIOR,
AND JOHN C. deARMAS, JR.,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable The Chief Justice and The Associate Justices Of The Supreme Court Of The United States:

Your petitioner, Patrick A. McKenna, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on March 20, 1958. On May 9, 1958, the said Court of Appeals denied Petition Of Appellant For Rehearing And Request That Such Hearing Be Had *En Banc*.

A certified transcript of the record in the above case together with the proceedings in the said Court of Ap-

peals, is filed herewith, in compliance with Rule 21 of the rules of this Court.

A.
Opinion Below

The District Court did not write an opinion (A. 44, 45). The opinion of the Court of Appeals for the District of Columbia, including the dissenting opinion of Circuit Judge Prettyman, (A. 57-69), is not yet reported, but is appended hereto (App.).

B.
Jurisdiction

The judgment of the Court of Appeals was dated and entered March 20, 1958 (A. 70). The Petition Of Appellant For Rehearing And Request That Such Hearing Be Had *En Banc* (A. 71-86) was denied May 9, 1958 (A. 87), Circuit Judge Miller dissenting and Circuit Judges Prettyman and Burger abstaining from participating therein.

The jurisdiction of this Court to review the above-mentioned decision of the Court of Appeals is invoked under the provisions of 28 U.S.C. Section 1254 (1):

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

C.
Questions Presented

I. Whether the Secretary of the Interior, acting under an admittedly *mandatory* statute directing the Secretary to

issue non-competitive oil and gas leases to the *first* person making application who is qualified, and under the Secretary's admittedly *mandatory* implementing regulation therefor, in the words of dissenting Circuit Judge Prettyman herein (App.), is

> "*bound by his own regulation* and had no power to depart from its requirements";

or whether the Secretary in

> "violation of a valid mandatory regulation . . . and . . . despite statutes and duly adopted rules, . . . can award any oil and gas lease according to what he at the moment deems to be fair and just and reasonable",

whereby the Secretary may award the lease to one

> "who was *not* the first applicant to qualify under the regulation." (emphasis added)

II. Whether, in dissenting Circuit Judge Prettyman's words,

> "The Secretary was in violation of the Act when he awarded the lease to deArmas, who was not the first applicant to qualify under the regulation. . . .",

instead of to petitioner

> "McKenna (who) was . . .the first qualified applicant for the lease."

III. Whether summary judgment can be granted a defendant, where facts material to the defendant's motion,

but immaterial to plaintiff's counter-motion for summary judgment, are placed in dispute?

D.
The Statutes, Regulation and Rule Involved

Statutes

1. Mineral Leasing Act for Acquired Lands of August 7, 1947, c. 513, 61 Stat. 914, 915 (30 U.S.C. 352, 359):

> "Sec. 3. . . . all deposits of coal, phosphate, oil, oil shale, gas, . . . which are owned or may hereafter be acquired by the United States and which are within the lands acquired by the United States . . . may be leased by the Secretary under the same conditions as contained in the leasing provisions of the Mineral Leasing Laws, subject to the provisions hereof."
>
> "Sec. 10. The Secretary of the Interior is authorized to prescribe such rules and regulations as are necessary and appropriate to carry out the purposes of this Act, which rules and regulations shall be the same as those prescribed under the Mineral Leasing Laws to the extent that they are applicable."

2. Mineral Leasing Act of February 25, 1920 as amended by the Act of August 8, 1946, c. 916, sec. 3, 60 Stat. 951 (30 U.S.C. 226, 184):

> "Sec. 17. . . . When the lands to be leased are not within any known geological structure of a producing . . . field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such land without competitive bidding."

"Sec. 27. . . . no person . . . shall take or hold at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State. . . ."

REGULATION

1 Circular 1668, 12 F. R. 8678, 43 CFR 200.5(a)(1):

"200.5. *Supplemental information required in lease or permit application; place for filing application.* (a) In addition to the information required by the appropriate regulations, referred to in § 200.4 each application for a lease or permit must contain (1) a separate statement of the applicant's interests, direct and indirect, in leases or permits for similar mineral deposits, or in applications therefor, on federally owned acquired lands in the same State, identifying by serial number the records where such interests may be found . . ."

RULE 56.
(Federal Rules of Civil Procedure)

SUMMARY JUDGMENT

(c) . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . .

E.
Statement of the Case

The Mineral Leasing Act (p. 4 *supra*) provides that "the person first making application for the lease who is quali-

fied to hold a lease under this Act shall be entitled" to the lease. The Act sets forth specific qualifications to be met by persons making application and authorizes the Secretary of the Interior to issue regulations prescribing the information a person is to submit in his application to establish whether or not he qualifies under the statute for a lease. The Secretary did duly promulgate a mandatory regulation (p. 5 *supra*) requiring a person, in making an application for a lease, to list all his Federal lease holdings and interests therein and to identify them by serial numbers. This mandatory regulation was in effect at all times pertinent hereto.

Respondent deArmas purported to make a filing on April 2, 1951 on the lands in question, in which he completely ignored this mandatory regulation requiring the listing of his Federal lease holdings and interests and their serial numbers. For more than three years thereafter, deArmas permitted his filing to remain defective and dormant, and the Secretary took no action upon this admittedly defective filing.

At all times prior to and subsequent to this case, the Secretary had held consistently, as a matter of established policy expressed in practice and in published opinions, and in compliance with the first-come first-served mandatory character of the statute, that if a person failed to comply with said mandatory regulation, he acquired no right whatsoever to a lease; and that while such a defective filing could be cured by amendment, this would make such person a qualified applicant only as of the date of the amendment. To do otherwise, indeed, would be to read the word "first" out of the statute.

Pursuant to this mandatory regulation and the underlying mineral leasing statute, your petitioner, McKenna, complied fully with all the requirements thereof in his application of August 17, 1954 for an oil and gas lease

on the lands in question and simultaneously tendered payments of rentals which were accepted by the Secretary.

Over a month *after* petitioner thus duly qualified for and became entitled to the lease in question, the Secretary, on October 28, 1954, issued an order in contravention of the before-mentioned consistent established policy and practice, waiving the mandatory requirements of said regulation as applicable to respondent deArmas, by permitting him to amend his long-dormant, admittedly defective application, *nunc pro tunc*, effective as of April 2, 1951.

The Secretary justified this ignoring of the violation of his mandatory regulation, upon the basis of an alleged practice, the existence of which the petitioner has consistently denied, of one of his subordinate agencies in ignoring the mandatory regulation—a practice which, if it existed, was *secret*, never published or duly promulgated; was admittedly entirely unknown to the Secretary, unknown to his Solicitor and unknown to the Department of the Interior itself; and which the Secretary had to condemn as "not legally justifiable". The Secretary took the view, nonetheless, that he would permit ignoring of his mandatory regulation, upon the basis of being fair, reasonable and rational in the light of this alleged practice, and despite the mandatory character of the statute and the regulation. The Secretary's opinion states that such relief should be given to an applicant who acted in "reliance" upon the alleged practice; but there was not even any allegation, let alone a finding, of such reliance by deArmas.

Petitioner's position, as concisely stated by dissenting Circuit Judge Prettyman, was that

> "The Secretary was in violation of the Act when he awarded the lease to deArmas, who was *not* the first applicant to qualify under the regulation." (emphasis added)

Further, the petitioner asserted that, under this statute and the mandatory regulation, petitioner, by complying with the same, became "entitled" to the lease and the Secretary had no authority or right to subvert the legal effect of these laws by issuing an order having retroactive effect. As Circuit Judge Prettyman further stated,

> "The vice in the present ruling is not that it permits amendment but that it permits *nunc pro tunc* amendment to validate a defective application after rights of another applicant have intervened. The court penalizes the careful, complying applicant and rewards the careless or non-complying. I think the Congress never intended to grant the Secretary (or his numerous administrative aides) such powers as are inherent in this rule of a fair, reasonable and rational choice of the successful applicant for an oil or gas lease . . . Government officers and citizens alike are bound by the terms of a regulation validly adopted and outstanding."

The petitioner, after exhausting his administrative remedies, brought a civil action in the District Court for the District of Columbia (A. 1), under the provisions of Title 11, Section 306 of the District of Columbia Code, Section 10 of the Administrative Procedure Act, 5 U.S.C. 1009, under the terms of 28 U.S.C. 2201, 2202 relating to Declaratory Judgments, and upon other Federal jurisdictional grounds set forth in paragraphs 2 to 4 of the complaint (A. 1, 2).

The case was heard upon cross motions for summary judgment, *based upon entirely different theories.* No affidavits were submitted on either side, but facts material to the respondent's theory, (namely, the existence of the before-mentioned secret, unpublished practice of the Secre-

tary's subordinate agency, and the matter of reliance of deArmas thereupon) were put in dispute by petitioner before the District Court. These facts, however, were immaterial to petitioner's counter-motion predicated upon the rule of law that the Secretary, his subordinates and the public are all bound by existing published mandatory regulations. The District Court, without opinion, granted the Secretary's motion (A. 44, 45), denying the petitioner a trial on the issues so put in dispute. Appeal was taken (A. 46) under the provisions of 28 U.S.C. Section 1291, to the Court of Appeals for the District of Columbia Circuit, and the action of the Secretary was upheld by a two-to-one decision, Circuit Judge Prettyman vigorously dissenting, as above indicated.

F.
Reasons Relied Upon For Allowance Of The Writ

1. Questions I and II Are Important Questions Of Federal Law.

The importance of the mineral leasing program, involving tens of thousands of oil and gas lease applications each year, was recognized by this Court by its grant of certiorari in, for example, *Chapman v. Sheridan-Wyoming Co.*, 338 U.S. 621, 629, 94 L. Ed. 393, 70 S. Ct. 392 (1950).

The vital importance of questions I and II, p. 2, 3 *supra*, for that program, is evident from Circuit Judge Prettyman's conclusion (App.) as to the consequence of the majority decision in this case, if it is permitted to stand:

> "the view now taken by the court destroys one of the fundamental principles of administrative rule-making, that is, that Government officers and citizens alike are

bound by the terms of a regulation validly adopted and outstanding."

As before stated, the Secretary's action in this case, *which will be binding for all future administration of the acquired lands, oil and gas leasing programs*, can only have the disastrous consequence described by Judge Prettyman in the following terms:

> "Chaos in the administrative law field will result *from the practice established in the present case*. Everybody will have the right to claim the benefits of the practice. Nobody will be able to abide a validly adopted regulation with certainty. Surely confusion will be among the least of the undesirable results." (emphasis added).

2. A Conflict Of Views Calling For An Exercise Of This Court's Power Of Supervision Has Arisen In The Court Of Appeals Itself.

Judge Prettyman's prediction of "chaos" and "confusion" instituted by the majority opinion in your petitioner's case has already been verified.

In the first place, the law as established in your petitioner's case is in direct conflict with an earlier decision of a different panel of this Court of Appeals, in which Judge Prettyman participated in the majority opinion, holding the Secretary to be bound by his regulation, *McKay v. Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F.2d 35 (1955). Judge Prettyman specifically points out this conflict, stating, in his dissent in your petitioner's case:

> "We considered a somewhat similar problem under this Act in *McKay v. Wahlenmaier* and decided it in accordance with the view which I here indicate."

Secondly, there have been two decisions by two still different panels of this Court of Appeals, subsequent to your petitioner's case, *which have specifically cited your petitioner's case as a precedent*—but in conflicting ways.

The first of these two subsequent decisions was rendered only one month after the decision in your petitioner's case. The majority of this different panel of the Court of Appeals for the District of Columbia, in *Barash* v. *Seaton* (Appeal No. 14069—not yet reported), in connection with the very same issue of leasing under the said Mineral Leasing Act of 1920 and the Secretary's regulations thereunder, declined to follow the law of your petitioner's case, though citing the same, and re-applied the law of *McKay* v. *Wahlenmaier*, supra, stating

> "These provisions *require* the Secretary to issue a lease to the first qualified applicant . . ."

It is significant, however, that Circuit Judge Fahy, who had rendered the majority opinion in your petitioner's case, dissented in part in the *Barash* case, declining to "disturb the Secretary's decision".

Just a few short weeks later, in *Seaton* v. *Texas Company, et al*, (Appeal Nos. 13636 and 13637, not yet reported and in which your petitioner, McKenna, appeared as *amicus curiae*, A. 56), Circuit Judge Fahy wrote the majority opinion for still a different panel of the Court of Appeals for the District of Columbia. Following your petitioner's case, the majority side-stepped the matter of the Secretary's duty under the said Act and regulations, stating

> "In the present case a statement of the applicable rule simply in terms of ministerial duty we think is not required . . . In this situation we think the court may

> decide whether the choice made by the Secretary between the private parties is plainly wrong in the eyes of the law."—CITING YOUR PETITIONER'S CASE!

Dissenting Circuit Judge Burger in this *Texas Company* case characterized the effect of that majority opinion as follows:

> "The majority holds that the Secretary is *compelled* to ignore the statutes prescribing the channels to be used" (emphasis, Judge Burger's).

And dissenting Circuit Judge Burger went on so to characterize your petitioner's case, also:

> "Recently in McKenna v. Seaton, No. 14095, decided March 20, 1958, this Court . . . sustained an action (of the Secretary) *comparable, in some respects in its legal impact*, to the action taken here . . ." (parenthesis and emphasis added).

In view of this hopeless conflict in the Court of Appeals itself, and this Honorable Court's recent pronouncement in *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) that although

> "desirable judicial administration commends consistency at least in the more or less contemporaneous decisions of different panels of a Court of Appeals . . . It is primarily the task of a Court of Appeals to reconcile its internal difficulties",

your petitioner filed a petition for rehearing and requested that such hearing be had *en banc* (A. 71). This petition was denied (A. 87), but probably only because Circuit

Judge Prettyman (who dissented in your petitioner's favor in petitioner's case) and Circuit Judge Burger (who dissented in the *Texas Company* case, *supra*, for the same reasons as Judge Prettyman) declined to participate in the consideration of the petition for rehearing.

The seriousness of the situation and the importance of prompt intervention by this Honorable Court, however, is pointed up by the unusual step taken by Circuit Judge Miller (who wrote the majority opinion of *McKay* v. *Wahlenmaier*, supra, that supports your petitioner's legal position) in noting a formal dissent to the refusal of the Court of Appeals to grant your petitioner's petition for rehearing (A. 87)!

In none of these conflicting decisions—*all resulting from the precedent of your petitioner's case*—has a single one of the different panels of the Court of Appeals rendered a unanimous decision. Each decision has had a dissent, and that, by a different circuit judge, as follows:

McKay v. *Wahlenmaier* 96 U.S. App. D.C. 313 226 F.2d 35 (1955)	*McKenna* v. *Seaton* (*March 20, 1958*)	*Barash* v. *Seaton* (April 25, 1958)	*Seaton* v. *Texas Company* (May 8, 1958)
Majority Judge Miller Judge Prettyman	*Majority* *Judge Washington* *Judge Fahy*	Majority Judge Edgerton Judge Bazelon	Majority Judge Fahy Judge Bazelon
Dissent Judge Washington	*Dissent* *Judge Prettyman*	Dissent (in part) Judge Fahy	Dissent Judge Burger
The Law: Secretary is "bound" to follow statute and regulations. "Ministerial duty" to issue lease to first applicant who is qualified.	*The Law:* "*Secretary . . . despite statutes and duly adopted rules, can award this lease to*" ". . . (*one*) "*who was not the first applicant to qualify under the regulation.*" "*We . . . return to the 'Chancellor's breakfast' theory*". (*quotes from Judge Prettyman*)	The Law: Secretary is "required" to follow statute and regulations and "to issue a lease to the first qualified applicant".	The Law: "The majority holds that the Secretary is *compelled* to ignore the statutes . . . " and to issue the lease to one who was not "the first qualified applicant". (quotes from Judge Burger)

This Court of Appeals of nine judges, sitting in panels of three judges, speaks through a multitude of different panels, and how the Court now, in the light of your petitioner's case, decides questions arising out of the administration of oil and gas leases thus appears to depend upon the composition of the particular panel.[1]

This is the "chaos" and "confusion" already come to pass not only in the Court of Appeals, itself, but for the annual *tens of thousands* of applicants for oil and gas leases, (and the many more that may follow the admission of Alaska to the Union), for the Secretary of the Interior and his Department, and for the judges of the District Court for the District of Columbia who will now doubtless receive a flood of litigation based upon the precedent of what Judge Prettyman termed "the practice established in the present case."

The moment of the circumstances above-recited is believed to be a cogent reason for the prompt granting of this petition by this Honorable Court. A similar conflict was the basis for granting a writ of certiorari in *United States ex rel Robinson* v. *Johnston*, 316 U.S. 649 (1942), in *Maggio* v. *Zeitz*, 333 U.S. 56, 68 S. Ct. 401 (1948), and in *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 70 S. Ct. 322 (1950).

3. The Court Of Appeals Decided Questions I And II In A Way In Conflict With Applicable Decisions Of This Court.

Altogether apart from the above reasons, the decision herein is also in direct conflict with several recent deci-

[1] It should be observed that it is not possible to obtain conflicting decisions in different Courts of Appeals since these matters are peculiarly within the province of the courts of the District of Columbia.

sions of this Honorable Court. Circuit Judge Prettyman points this out in his dissenting opinion,

> "the Secretary was bound by his own regulation and had no power to depart from its requirements. Such is the plain holding of the *Accardi* case . . . (Accardi v. Shaughnessy, 347 U.S. 260, 98 L. Ed. 681, 74 S. Ct. 499, 1954);"
>
> "My position is also supported by the ruling of the Supreme Court in *Service* v. *Dulles*. (354 U.S. 363, 1 L. Ed. 1403, 77 S. Ct. 1152, 1957) . . .; In *Chapman* v. *Sheridan-Wyoming Co.* . . . (338 U.S. 621, 629, 94 L. Ed. 393, 70 S. Ct. 392, 1950) . . . also Columbia System v. United States, 316 U.S. 407, 422, 86 L. Ed. 1563, 62 S. Ct. 1194, 1942) . . ."
>
> "The rulings of the Supreme Court on the matter are *explicit* and *unmistakable*." (emphasis added)

Such direct conflict with decisions of this Honorable Court is also an important reason for this Court to grant the requested review.

4. The Decision On Question III Is In Conflict With The Decision Of Another Court Of Appeals On The Same Matter.

The present decision is also in direct conflict with the provisions of Rule 56(c) of the Federal Rules of Civil Procedure (p. 5 *supra*) and directly in conflict with decisions of other Courts of Appeals relating to the same, including *Walling* v. *Richmond*, 2 Cir. 154 Fed. 2d, 780, 784, Cert. den. 328 U.S 870, on the matter of the propriety of granting summary judgment for a defendant when the

facts material to the defendant's motion were placed in dispute by the plaintiff. The present decision, unlike the *Walling* v. *Richmond* case, refuses to recognize that circumstances can arise, as here, where disputed facts material to the defendant's motion can be immaterial to the plaintiff's different theory of the case based upon plaintiff's counter-motion for summary judgment.

The proper construction of Rule 56 under this type of circumstance (28 U.S.C. Section 2072) and the above-mentioned conflicting decisions between different Circuit Courts of Appeals are also of great moment and it is believed should be promptly resolved by this Court.

G.
Conclusion

For the reasons stated, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14095

PATRICK A. MCKENNA, APPELLANT

v.

FRED A. SEATON, Secretary of the Interior, and JOHN C. DE ARMAS, JR., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided March 20, 1958

Messrs. Robert H. Rines and *Samuel Nakasian* for appellant.

Mr. Fred W. Smith, Attorney, Department of Justice, with whom *Mr. Roger P. Marquis*, Attorney, Department of Justice, was on the brief, for appellee Seaton. *Mr. S. Billingsley Hill*, Attorney, Department of Justice, also entered an appearance for appellee Seaton.

Mr. Marvin J. Sonosky for appellee de Armas.

Before PRETTYMAN, FAHY and WASHINGTON, *Circuit Judges*.

FAHY, *Circuit Judge*: The Secretary of the Interior, an appellee, on May 18, 1956, issued an oil and gas lease of acquired land[1] to John C. de Armas, Jr., also an appellee, rather than to competing applicant Patrick A. Mc-

[1] The term "acquired lands" is used in distinction to "public lands." The only difference material here is that oil and gas leases of the latter are authorized by the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 (1952), whereas leases of the former are authorized by the Acquired Lands Act of 1947, 61 Stat. 913, 30 U.S.C. § 351 (1952).

Kenna, appellant. McKenna sued in the District Court for cancellation of the de Armas lease and for a direction that the Secretary issue a lease to McKenna as "the first qualified applicant.[2] On motions for summary judgment filed by the Secretary, by de Armas, and by McKenna,[3] the court, with the proceedings in the Department of Interior before it, granted the motions of the Secretary and of de Armas, and dismissed McKenna's complaint. We affirm for reasons herein stated.

De Armas filed his application April 2, 1951. McKenna filed his August 17, 1954. De Armas accordingly was first in time by more than three years. If he was qualified as well he was entitled to the lease in preference to McKenna. This is so because the lease to be issued was of the non-competitive character covering acquired land not within a known geographical structure. In this situation the governing statute provides that the lease shall go to "the person first making application for the lease who is qualified to hold a lease."[4] Section 17 of the Mineral Leasing Act of February 25, 1920, 41 Stat. 443, as amended, 30 U.S.C. § 226 (1952).[5] The statute also provides, however,

[2] The lease for which both applied embraced 1,865.36 acres in Ts. 24 S., Rs. 32 and 33 E., Louisiana Meridian, Louisiana.

[3] McKenna stated in his motion:

> As appears from the pleadings and the admissions of the defendant [the Secretary] and the intervener [de Armas] contained in their respective motions for summary judgment and the accompanying points and authorities and brief, together with the exhibits accompanying the same, upon which the plaintiff will rely at the hearing on this motion, *there is no genuine issue as to any material fact.* [Italics supplied.]

[4] The requirements for qualification set by the statute involve only citizenship, 41 Stat. 437 (1920), as amended, 30 U.S.C. § 181 (1952), and acreage limitation, 41 Stat. 448 (1920), as amended, 30 U.S.C. § 184 (1952).

[5] This and other provisions of the 1920 Act are made applicable to the leasing of acquired lands by section 3 of the 1947 Act, 61 Stat. 914, 30 U.S.C. § 352 (1952).

that an applicant shall not hold "at one time oil or gas leases exceeding in the aggregate fifteen thousand three hundred and sixty acres granted hereunder in any one State." Section 27 of the Act, 41 Stat. 448, as amended, 30 U.S.C. § 184 (1952).[6] De Armas' holdings did not disqualify him under this provision; but McKenna contends that de Armas did not include in his application all the information about his holdings required by applicable regulations and, therefore, this disqualified him. De Armas' application did state that he owned no more than the permitted acreage, which was all that was required to be stated by the regulations for public land applications, 15 Fed. Reg. 8583 (1950), 43 C.F.R. § 192.42(a) (Supp. 1951),[7] though not for acquired land. The latter called for a listing by the applicant of his leasehold interests, with reference to their serial numbers. 12 Fed. Reg. 8678 (1947), 43 C.F.R. § 200.5(a)(1) (1949). Previous to January 28, 1951, this listing had been required in applications embracing each category of land, see *ibid* and 13 Fed. Reg. 9567 (1948), 43 C.F.R. § 192.42(a)(3) (1949), but effective that date had been eliminated as to public land, in favor simply of an affirmative statement that the applicant did not own leasehold interests in the same state covering more acreage than the statutory maximum. 15 Fed. Reg.

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[6] Amended August 2, 1954, to increase the allowable acreage to 46,080, a provision not here material. 68 Stat. 648, 30 U.S.C. § 184 (Supp. IV, 1957).

[7] This section provided: "To obtain a noncompetitive lease, an offer to accept such a lease must be made on Form 4-1158, 'Offer and Lease Form.'" Paragraph 5(b) of that form contained the following certificate which the applicant must sign:

> Offeror's other interests, direct and indirect in oil and gas leases and applications or offers therefor in the same State do not exceed 15,360 chargeable acres.

Form 4-1158 is printed at 15 Fed. Reg. 8585 (1950).

8583 (1950), 43 C.F.R. § 192.42(a) (Supp. 1951).[8] The discrepancy between the regulations was rectified November 3, 1954,[9] when applications for acquired land were also permitted to contain merely the statement authorized by the January 28, 1951, amendment of the public land regulations, 19 Fed. Reg. 7127, 43 C.F.R. §200.5 (1954).

In the meantime, in what became known as the first *Hooper* decision, of August 3, 1954, the Secretary ruled that the separate listing in acquired land applications was mandatory, but that an omisson in this regard was a curable defect. Moreover, he ruled that priority would pertain only as of the time the defect was cured by the filing of the information as a part of the application.

At the request of the Bureau of Land Management the Secretary reconsidered his first *Hooper* decision. The Bureau advised the Secretary that ever since the regulations for public land applications had been amended January 28, 1951, the Bureau had considered separate listing of holdings no longer necessary in applications for leases of acquired land either, and had processed many applications and issued many leases under this practice as compliance with 12 Fed. Reg. 8678 (1947); 43 C.F.R. § 200.5(a)(1) (1949).

In view of this situation the Secretary, on October 28, 1954, in his second *Hooper* decision, held that to deny priority to all applications filed before August 3, 1954, on the ground they did not contain the separate listing would

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[8] When acquired lands were placed under the authority of the Secretary by the Act of August 7, 1947, 61 Stat. 913, 30 U.S.C. § 351 (1952), the Secretary was authorized to issue leases on such lands, insofar as pertinent, "under the same conditions as contained in the leasing provisions of the mineral leasing laws," that is, the laws governing public land, and to prescribe regulations which were, to the extent applicable, to be the same as those governing public land. 61 Stat. 914, 915 (1947), 30 U.S.C. §§ 352, 359 (1952).

[9] The regulation was issued by the Secretary on October 28, 1954, but not printed in the Federal Register until November 3.

be "a harsh result." On the basis of this and other considerations, citing *Bassie, et al., Chapman and Kitchner*, 59 I.D. 235, and notwithstanding his view that the Bureau's practice was "not legally justifiable, and acquired land lease applications which do not contain the statement required by 43 CFR 200.5 are defective," he ruled:

> fairness and equity would seem to require that an applicant or a lessee who has filed an application deficient in this respect in reliance upon the administrative construction should be given time to cure the defect by supplying the details required by the regulation without loss of priority, if all else is regular.

Applicants were given until December 1, 1954, to cure the defect.

On October 21, 1954, de Armas filed a corrected application, listing his leaseholdings. In the meantime, between the first and second *Hooper* decisions, McKenna had filed, August 17, 1954, listing his leaseholdings. We agree with the District Court in rejecting his claim that this gave him priority over de Armas.

Although the Secretary said that the practice adopted by the Bureau beginning January 28, 1951, was "not legally justifiable," the fact is he decided that an application filed subsequent to that date, though defective in omitting separate listing of other interests, could be corrected without loss of priority if otherwise regular. De Armas' application was corrected and was otherwise regular as well as long prior in time. And even before correction it conformed with a practice in general use which the Bureau construed as sufficient. In these circumstances we cannot say that the issuance of the lease to de Armas was arbitrary, capricious, or otherwise illegal. He had met the requirements of the statute itself, which, moreover, contemplated administration of leases on acquired

land as nearly as possible like those on public land. See note 4, *supra*. Uniformity in practice had been adopted pending reassertion of uniformity in terms of regulations. To decide that the defect was curable within a specified time without loss of priority appears to us to be an entirely fair, reasonable, and rational administrative action, not inconsistent with any statutory provision or any principle of law or equity. No regulation required the Secretary to hold that the defect in de Armas' application deprived him of priority or disqualified him.

In support of his contrary position McKenna cites *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, and *Service* v. *Dulles*, 354 U.S. 363, the latter of which applied the principles laid down in the former. We think those principles are not applicable. In *Accardi* it is held that where the Attorney General, in fulfilling his responsibilities in connection with the deportation of certain aliens under the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U.S.C. § 155(c) (1946 ed. Supp. V, 1952), had by regulation prescribed that there should be proceedings before, and a decision, by the Board of Immigration Appeals prior to decision by the Attorney General himself, the Attorney General could not "sidestep the Board or dictate its decision in any manner." 347 U.S. at 267. In applying the underlying *Accardi* principles in *Service*, involving the discharge of an employee under regulations relating to loyalty and security, the Court held that regulations validly prescribed by a Government administrator were binding upon him as well as upon the citizen, even when the administrative action under review was discretionary in nature. In both *Accardi* and *Service* the regulations were for the obvious purpose of aiding the Government in reaching a correct decision affecting an individual who claimed the benefit of the prescribed administrative procedures.

The case before us is quite different. A choice was here to be made between two individuals claiming the same right. The Secretary was to decide which of the two was the first qualified applicant. One of the applicants had not initially complied fully with an applicable regulation. But no law or regulation required the Secretary to hold that this in itself disqualified that applicant so as to give priority to another who was later by three years but who complied literally with that particular regulation.[10] The Secretary merely decided that the defect in de Armas' application could be cured within a specified time without loss of his priority. This was not a failure to enforce any regulation, for none bound the Secretary to do otherwise. He simply gave more weight to three years of priority than to what he considered to be a curable irregularity in an application —an irregularity which had no special significance whatever in terms of a fair and reasonable administration of the land laws. See *El Paso Brick Co. v. McKnight*, 233 U.S. 250, 258-59, where, in a case involving a conflict between two claimants, it is said:

> The Government does not deal at arm's length with the settler or locator and whenever it appears that there has been a compliance with the substantial requirements of the law, irregularities are waived or permission is given, even on appeal, to cure them by supplemental proofs. *United States* v. *Marshall Mining Co.*, 129 U.S. 579, 587.

Moreover, there is a long line of decisions of the Supreme Court, of this court, and of other courts, that the primary responsibility for the solution of such questions as this,

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[10] Cf. 15 Fed. Reg. 8583 (1950), as amended by 16 Fed. Reg. 7419 (1951), 43 C.F.A. § 192.42(g) (Supp. 1952); Form 4-1158, printed at 15 Fed. Reg. 8585 (1950). And see 19 Fed. Reg. 9039 (1954), 43 C.F.R. § 200.8(g) (1954).

arising in the administration of the land laws, is with the Secretary of the Interior, whose decision will not be superseded by the courts except under limited conditions. These conditions are expressed variously in the opinions of the courts, and we need not adopt as applicable to the circumstances of the present case all prior expressions. But a fair common denominator, as it were, of the conditions which will cause judicial repudiation of administrative action by the Secretary, is at least that he is plainly wrong. *Lane* v. *Hoglund*, 244 U.S. 174; *Chapman* v. *Santa Fe Pac. R. Co.*, 90 U.S. App. D.C. 34, 198 F.2d 498. We think here he was right, and well within his lawful authority, in holding that de Armas was the first qualified applicant.

McKay v. *Wahlenmaier*, 96 U.S. App. D.C. 313, 226 F.2d 35, also presented a very different situation. We there held that one of the applicants could not legally be given priority as the first qualified applicant, because of several serious violations of regulations which related definitely to the question of qualification. For example, non-compliance caused not to be revealed the applicant's interests in other leases through stockholdings in a corporation, and, also, caused not to be revealed the fact that in substance the applicant was through other connections applying for the same lease, thus having more than one chance to acquire the lease, which was inconsistent with long established standards for the fair treatment of all applicants.[11] For

[11] The applications in *Wahlenmaier* were made under a section of the Secretary's regulations which provided for a determination of the "first qualified applicant" by a public drawing. This regulation read:

> Each applicant well be . . . required . . . to furnish a statement that the application is filed solely on his own behalf and not for any other person, association, or corporation . . . If any applicant fails to comply with the requirements, his application will not be entered in the drawing but will be rejected without further notice.

11 Fed. Reg. 12958 (1946), 43 C.F.R. § 192.43 (Supp. 1946).

these and other reasons, as enlarged upon in the opinion, the applicant was held not qualified. The case has no significant resemblance to the one at bar. As we have seen, the statute requires the lease to be granted to the first person making application "who is qualified." The Secretary did no more than recognize that de Armas was that person.

We think the judgment entered by Judge McGuire for the defendant and intervenor, appellees, should be and it is

Affirmed.

PRETTYMAN, *Circuit Judge*, dissenting: The Mineral Leasing Act provided[1] that "the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled" to the lease. It further provided[2] that no person shall hold at one time oil or gas leases under the statute exceeding fifteen thousand three hundred and sixty acres[3] in any one State. The Mineral Leasing Act for Acquired Lands authorized the Secretary of the Interior to prescribe such regulations as are appropriate to carry out the purposes of the Act.[4] The Secretary promulgated a regulation[5] which provided:

> "* * * each application for a lease or permit must contain (1) a separate statement of the applicant's interests, direct and indirect, in leases or permits for

[1] 60 Stat. 951 (1946), as amended, 30 U.S.C.A. § 226.

[2] 60 Stat. 954 (1946), 62 Stat. 291 (1948), as amended, 30 U.S.C.A. § 184.

[3] Increased to forty-six thousand and eighty acres by an act of Aug. 2, 1954, 68 Stat. 648.

[4] 61 Stat. 915 (1947), 30 U.S.C.A. § 359.

[5] 43 C.F.R. § 200.5 (1949 ed.)

> similar mineral deposits, or in applications therefor, on federally owned acquired lands in the same State, identifying by serial number the records where such interests may be found * * *."

Appellee de Armas filed an application on April 2, 1951, which did not conform to the foregoing regulation; it did not list his specific leaseholdings or their serial numbers. The regulation was mandatory and unqualified; it said "must contain". No action was taken on that application. More than three years later, on August 17, 1954, appellant McKenna filed an application for the same lease, and his application fully complied with the regulation. Thereafter the Secretary permitted de Armas to amend his application *nunc pro tunc* so as to supply the required information omitted from his original application. The Secretary then awarded the lease to de Armas.

Appellant McKenna was the first person to file an application in accordance with the regulation and was therefore the first qualified applicant for the lease. The Secretary was in violation of the Act when he awarded the lease to de Armas, who was not the first applicant to qualify under the regulation.

It is my view that the Secretary was bound by his own regulation and had no power to depart from its requirements. Such is the plain holding of the *Accardi* case,[6] in which the Supreme Court held that, when the Attorney General by regulation established a Board of Immigration Appeals, requiring it to exercise its judgment in the consideration of appeals in deportation matters, he himself was bound by the regulation and could not dictate the Board's decision or announce his intention in respect to a case before the Board had decided it. My position is also

[6] Accardi v. Shaughnessy, 347 U.S. 260, 98 L. Ed. 681, 74 S. Ct. 499 (1954).

supported by the ruling of the Supreme Court in *Service* v. *Dulles*.[7] The Court there held the discharge of Service to be invalid, on the ground that the discharge violated the regulations of the Department of State, which were binding on the Secretary. In *Chapman* v. *Sheridan-Wyoming Co.*[8] the Court, speaking of a regulation under the Mineral Leasing Act, said: "That it binds him [the Secretary] as well as others while it is in effect is not doubted."[9] We considered a somewhat similar problem under this Act in *McKay* v. *Wahlenmaier*[10] and decided it in accordance with the view which I here indicate.

The Secretary attempts to justify his departure from his outstanding regulation by saying (a) that the Bureau of Land Management, a subordinate bureau in his Department, had, unknown to him, as a matter of administrative practice ignored the outstanding regulation and (b) that equitable considerations which seem to him fair, reasonable and rational require that an applicant deficient under the regulation should be given time to supply details necessary to cure the defect and to have such amendment retroactive in date. The Assistant Secretary of the Interior who authorized the *nunc pro tunc* amendment of defective applications said regarding the Bureau's practice, "Although the practice is not legally justifiable,

[7] 354 U.S. 363, 1 L. Ed. 1403, 77 S. Ct. 1152 (1957).

[8] 338 U.S. 621, 629, 94 L. Ed. 393, 70 S. Ct. 392 (1950).

[9] See also *Columbia System* v. *United States*, 316 U.S. 407, 422, 86 L. Ed. 1563, 62 S. Ct. 1194 (1942), where the Court said:

> "When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one 'which we will follow in exercising our licensing power,' they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them."

[10] 96 U.S. App. D.C. 313, 226 F.2d 35 (1955).

and acquired land lease applications which do not contain the statement required by 43 CFR 200.5 are defective," permission to amend should be given.

In my view equitable considerations do not constitute a valid ground for violation of a valid mandatory regulation. No such exception is indicated in *Accardi* or in *Service*. Fair, reasonable and rational considerations apapply to discretion absent a regulation; they cannot supersede an unequivocal regulation validly prescribing the terms of a valid application. Particularly, it seems to me, is no such exception permitted where the circumstance which gives rise to the equitable considerations is a practice admittedly not legally justifiable. Moreover, if the ruling is fair, reasonable and rational as to de Armas, what about McKenna? Is the Secretary to choose, in the face of the regulation, the person in whose favor he is to be fair, reasonable and rational? In administrative law are we to return to the "Chancellor's breakfast" theory?

Of course there was a margin of time when amendment might have been granted de Armas by administrative courtesy. By the regulation then in force his application could have been amended and would then have taken the date of the amendment. But that time for effective correction of the defective document expired when McKenna filed his application. The vice in the present ruling is not that it permits amendment but that it permits *nunc pro tunc* amendment to validate a defective application after rights of another applicant have intervened. The court penalizes the careful, complying applicant and rewards the careless or non-complying. I think the Congress never intended to grant the Secretary (or his numerous administrative aides) such powers as are inherent in this rule of a fair, reasonable and rational choice of the successful applicant for an oil or gas lease.

It seems to me that the view now taken by the court destroys one of the fundamental principles of administrative rule-making, that is, that Government officers and citizens alike are bound by the terms of a regulation validly adopted and outstanding. These regulations are available to the public, made known by a process prescribed by statute to those who deal with the Government. The rulings of the Supreme Court on the matter are explicit and unmistakable. Chaos in the administrative law field will result from the practice established in the present case. Everybody will have the right to claim the benefits of the practice. Nobody will be able to abide a validly adopted regulation with certainty. Surely confusion will be among the least of the undesirable results.

The basic problem is the "rule of law". We have laws—either statutes or rules legally adopted,—and we are supposed to be governed by them. If our governors merely do whatever strikes them as just and fair and reasonable at the moment, we have rule by men instead of by law. These are not cliches. Rule by law alone is the precise essential which differentiates our system from the totalitarian system. If the Secretary of the Interior, despite statutes and duly adopted rules, can award this lease to de Armas, he can award any oil and gas lease according to what he at the moment deems to be fair and just and reasonable. Not law but the will of the Secretary will then govern in respect to the beneficiaries of these great items of national wealth.